BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

IN THE MATTER OF THE REQUEST FOR AGENCY ACTION OF EP ENERGY E&P COMPANY, L.P. FOR AN ORDER POOLING ALL INTEREST, INCLUDING THE COMPULSORY POOLING OF THE INTERESTS OF ARGO ENERGY PARTNERS, LTD., DUSTY SANDERSON, HUNT OIL COMPANY, KKREP, LLC, AND J.P. FURLONG CO., IN THE DRILLING UNIT ESTABLISHED FOR THE PRODUCTION OF OIL, GAS AND ASSOCIATED HYDROCARBONS FROM THE LOWER GREEN RIVER-WASATCH FORMATIONS COMPRISED OF ALL OF SECTION 2, TOWNSHIP 3 SOUTH, RANGE 5 WEST, U.S.M., DUCHESNE COUNTY, UTAH	**RESPONSE TO REQUEST FOR AGENCY ACTION** Docket No. 2015-013 Cause No. 139-130

COMES NOW, J.P. Furlong Co., ("Respondent"), acting by and through its attorney, Anthony T. Hunter, pursuant to Utah Admin. Code Rule R641-104-140, hereby responds to that Request for Agency Action filed by EP Energy E&P Company, L.P. ("EPE" or "Petitioner") on March 10, 2015 (the "RAA") with the Board of Oil, Gas and Mining (the "Board"), requesting that the Board pool the interests in the spaced formation within the section, including involuntarily pooling the interests of the Respondent and Respondent's lessor and imposing: 1.) the terms of Petitioner's Joint Operating Agreement ("JOA"), 2.) statutory non-consent penalties, and 3.) the entire cost of plugging and abandoning the well on the captioned lands on the so-called "non-consenting" parties. In response to the RAA, the Respondent respectfully states and represents:

1. Respondent is a North Dakota corporation in good standing which is not required to be registered as a foreign corporation pursuant to exceptions found in Utah Code Ann. § 16-10a-1501(2)(a) and (i).

2. As a matter of law, every single party Petitioner refers to as "Non-Consenting FP Parties" (RAA, ¶ 1), is incapable of being designated as "nonconsenting owner" under Utah Code Ann. § 40-6-2 (11). The precise wording of the statutory definition is:

> "Nonconsenting owner" means an owner who *after written notice* does not consent *in advance* to the drilling and operation of a well or agree to bear his proportionate share of the costs (*emphasis added*).

By Petitioner's own evidence and admission, Petitioner did not give Argo Energy Partners, Ltd. and Dusty Sanderson notice and opportunity to consent to drilling the Neihart 2-2C5 Well (the "Neihart Well") until September 16, 2014 – over a month *after* it was spudded on August 7, 2014. *See* Petitioner's Exhibits D and H; and RAA at ¶ 10. Petitioner did not give Respondent notice and opportunity to consent to drilling the Neihart Well until December 16, 2014 – over two months after the well was *completed* as a producer on October 10, 2014. *See* Petitioner's Exhibit M; and RAA at ¶ 10. Utah case law and common sense dictate that in order for a party to be subject to a risk *penalty*, that party should have the opportunity to *actually take the risk*.[1] Without proper notice of the opportunity to participate in a well, the Board may not impose a nonconsent penalty. *Hegarty v. Board of Oil, Gas and Mining*, 57 P.3d 1042, 1050 (Utah, 2002).

---

1 In a case which went against the non-operator in a *contractual* risk penalty scenario, the Utah Supreme Court noted: "SAM Oil cannot be responsible for drilling and operating costs as a participating working interest owner; it did not participate in the drilling at a time *when there was risk to be borne*." *In the Matter of SAM Oil, Inc., et al.*, 817 P.2d 299 (Utah 1991) at Footnote 3 (*emphasis added*). And, when distinguishing the result of the case from other persuasive precedent, the Court noted:

> "In Traverse Oil, the court ruled that the state improperly imposed a risk penalty on a party who was forced to join his interest with others under a *compulsory pooling* order. *Producing wells had been drilled prior to the entry of the order.* The court found that the penalty was improper because the penalized party 'was not afforded the opportunity to participate in the drilling costs and avoid the penalty because the wells were completed before pooling was ordered.'" *Id.* at Footnote 4, *quoting Traverse Oil v. Natural Resources Commission,* 396 N.W.2d 498, 505 (Mich. App. 1986) (*emphasis added*).

3. Assuming *arguendo* that the Board had the legal authority to impose the statutory penalty, the facts of the case preclude its imposition. Contrary to Petitioner's assertions, and despite the fact that the Neihart Well is a *fait accompli,* Respondent has consented to participate. Indeed, every single one of the so-called "Non-Consenting FP Parties" has consented in writing to participation in the Neihart Well. (*See* Petitioner's Exhibits E, J, and N). What has been uniformly rejected is the unilateral imposition of the terms of participation that Petitioner has unlawfully placed upon their participation. *Id.* The statutory definition of "nonconsenting owner" is silent on the requirement of the owner to agree to the operator's terms.[2]

4. A spacing order gives every owner within the drilling unit a vested right to produce a share of the oil and gas resource located in the spaced formation under the spaced acreage. *Cowling v. Board of Oil, Gas and Mining,* 830 P.2d 220, 225-226 (Utah, 1991). In the absence of a voluntary pooling agreement, it is the Board's *discretionary* duty to impose one, and it is further at its *discretion* to decide the source and nature of its terms, as evidenced by the Legislature's use of the word "may." *See* Utah Code Ann. § 40-6-6.5 (2).

5. Petitioner relies on the language of Utah Admin. Code Rule R649-2-9 (1) for the proposition that failure to *either* agree to participate in a proposed well *or* failure to agree to terms of participation is sufficient to define "refusal to agree," and therefore trigger the imposition of the nonconsent penalty. The cited regulation contains no conjunction between subparts (1.1) and (1.2).

---

2 The Utah Supreme Court, like the Legislature, is silent on the issue of whether refusal to agree to the precise terms of participation triggers the nonconsent penalty. "Therefore, the threshold requirement for nonconsent is the establishment of written notice sufficient to trigger the necessity for *consent and sharing of costs* in a specific well impacting a landowner's tract, or deliberate refusal." *Hegarty v. Board of Oil, Gas and Mining,* 57 P.3d 1042, 1049 (Utah, 2002) (*emphasis added*).

Imposition of this statutory penalty must be done with the "strictest adherence" to the law.[3] Therefore, the two subparts must be read as joint requirements, not several. As demonstrated by the evidence, all parties have agreed in writing to participate. In other words, no one has failed to carry the burden imposed by Utah Admin. Code Rule R649-2-9 (1.1). Because all parties have met this burden, no further inquiry need be made into the burden imposed by (1.2).[4]

6. Even assuming that the two clauses could be read in the disjunctive rather than the conjunctive, Petitioner cites no authority in either statute or regulation to impose a contractual "condition"[5] on the offer to exercise a statutory right to participate in developing an owner's vested share of the common resource under the drilling unit. Were the Board to permit this negotiation-by-ultimatum, it would constitute an unlawful delegation of the exercise of its discretion under the pooling statute.[6] Indeed, this permissive interpretation of Utah Admin. Code Rule R649-2-9 (1) eviscerates Utah Code Ann. § 40-6-6.5 (2)(c)(ii) and (iii), by *prima facie* concluding that any terms offered by an operator are just and reasonable – the only question of fact is whether or not there was a voluntary agreement reached.

7. Petitioner has failed to demonstrate its ability to negotiate the terms of its JOA in good faith. When Respondent's initial position is that "the company normally does not sign JOA's" (*See* Petitioner's Exhibit Q) and Petitioner's initial position is "[Respondent's] right to elect to

---

3 *See Hegarty, supra,* at 1048.

4 The *Hegarty* Court refused to analyze the operation of this Rule as it disposed of the case via the operator's failure to provide the landowner written notice in advance of drilling the well. *Id.*

5 "Furlong signed the AFE, but refused to execute the JOA provided by EPE and upon which the AFE *was conditioned.*" *See* RAA at ¶ 9 (*emphasis added*).

6 In striking down a delegation of *legislative* power to an *administrative* body that was in turn beholden to the whim of a *majority* of private interests, the Utah Supreme Court has stated "If we could properly presume that such 70% would only act in the public interest and would act when that interest necessitated action there might be argument for

participate in the [Neihart] Well is ***conditioned*** upon your concurrent execution of the Joint Operating Agreement..." (*See* Petitioner's Exhibit M, *emphasis in original*), reason suggests that trading edits to Petitioner's form indicates substantial ground given by the Respondent. Further, after Respondent personally visited Petitioner's office[7], when all but one[8] of those edits is initially rejected or rejected pending clarification (*See* Petitioner's Exhibit R, dated February 25, 2015), reason suggests that, in fact, the Petitioner is failing to negotiate in good faith. Finally, when the requested clarifications (*See* Petitioner's Exhibit S, dated March 6, 2015) are not met with further discussion, but rather a filing of this RAA (March 10, 2015), *then* a rejection letter a week later, (See Petitioner's Exhibit T, dated March 17, 2015), insisting that the original JOA "as proposed" would be Petitioner's stance before the Board, Petitioner's repeated exhortations of its commitment to good faith negotiations throughout its exhibits start to look less like records created in the ordinary course of business and more like a proactively managed paper trail for an eventual forced pooling hearing.[9]

8. Petitioner's RAA makes no provision for the payment of Hunt Oil Company's ("Hunt") landowner royalty as required by Utah Code Ann. § 40-6-6.5 (5). This is a mandatory part of any Board order that includes nonconsenting owners.[10] That royalty rate is 20%. *See* Petitioner's Exhibit K, Page 1.

---

upholding the law." *Revne v. Trade Commission, et al.*, 192 P.2d 155, 157-158 (Utah 1948).

7 *See* Petitioner's Exhibit P, Page 4, Email dated February 11, 2015. "I met with Tim [of Respondent] and Kruise [of KKREP, LLC] this afternoon. Our conversation went very well."

8 Item No. 2 on Exhibit R was accepted by Petitioner – it added the Hunt lease to the JOA's Exhibit A. This is a clerical edit that would have happened eventually whether Respondent requested it or not... or done administratively by a forced pooling order.

9 A prime example is Respondent's clarification on Item No. 1 on Exhibit S. Respondent's issue was the cross-applicability of lien rights. The plain language of the disputed provision states at Item No. 5 "Each party grants to the other parties hereto a lien upon any interest..." If Petitioner was really looking for common ground, it missed some.

10 "If a nonconsenting owner's tract in the drilling unit is subject to a lease or other contract for the development

9. Finally, whether through unclear drafting or misapplication of Utah Code Ann. § 40-6-6.5 (d)(i)(B), it appears that Petitioner is requesting that the Board's eventual order in this case impose the entire plugging and abandonment cost of the Neihart Well on the so-called "Non-Consenting FP Parties." Respondent opposes any imposition of plugging and abandonment costs that does not include all working interest owners proportionately as dictated by the statute.

WHEREFORE, the Respondent respectfully requests that the Board:

1. GRANT Petitioner's RAA insofar as it pools all interests in the Spaced Formation under the captioned lands; and
2. ORDER payment of the lessor's royalty due to Hunt Oil Company commensurate with its share of production from the Spaced Formation under the captioned lands; and
3. DENY Petitioner's RAA insofar as it:
   a) Unilaterally imposes the terms of its proffered JOA; and
   b) Demands statutory non-consent penalties; and
   c) Requires that plugging and abandonment costs are borne by fewer than all working interest owners in the drilling unit; and
4. ADOPT such terms of the proffered JOA, submitted exhibits, and testimony of the parties that are just and reasonable for the operation of the drilling unit; and

---

of oil and gas, the pooling order *shall provide* that the consenting owners shall pay any royalty interest or other interest in the tract not subject to the deduction of the costs of production from the production attributable to that tract." Utah Code Ann. 40-6-6.5 (5) (*emphasis added*).

5. Make such findings and conclusions in connection with the RAA as it deems necessary; and

6. Provide for such other and further relief as may be just and equitable under the circumstances.

Respectfully submitted this 8th day of April, 2015.

By: _____

Anthony T. Hunter #11675
4715 W. Central
Wichita, KS 67212
(316) 444-0741
(316) 448-0725 Fax
hunterath@gmail.com
Attorney for J.P. Furlong Co.

Address of Respondent:
J.P. Furlong Co.
Attn: Timothy P. Furlong
P.O. Box 2357
Bismarck, ND 58502

CERTIFICATE OF MAILING

I certify that I caused a true and correct copy of the foregoing document to be mailed via U.S. Postal Service and via electronic mail to the below named parties.

Fredrick M. MacDonald, Esq.
7090 Union Park Ave., Suite 400
Salt Lake City, UT 84047

fred@macmillerlegal.com

Steve F. Alder, Esq.
1594 W. North Temple Suite 300
Salt Lake City, UT 84116

stevealder@utah.gov

Michael S. Johnson, Esq.
1594 W. North Temple Suite 300
Salt Lake City, UT 84116

mikejohnson@utah.gov

Signed, this 8th day of April, 2015.